Filed 7/26/19 In re M.S. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re M.S., a Person Coming Under the Juvenile Court Law.	B295030 (Los Angeles County Super. Ct. No. DK22287)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KATHY M., Defendant and Appellant.	

APPEAL from dispositional orders of the Superior Court of Los Angeles County, Robin R. Kesler, Referee. Reversed and remanded with directions.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Stephanie Jo Reagan, Principal Deputy County Counsel, for Plaintiff and Respondent.

Kathy M. (mother) appeals from the denial of her petition under Welfare and Institutions Code[1] section 388 to change the juvenile court's dispositional orders in a dependency proceeding concerning her daughter M.S. The juvenile court had denied mother reunification services pursuant to section 361.5, subdivision (e), which governs reunification services for incarcerated parents; at that time, mother was in federal prison in Florida. The juvenile court also granted mother monitored telephone calls with M.S.

Mother's section 388 petition claimed she had been released from prison, had completed various drug, communication, and other courses in prison, and requested reunification services and liberalized visitation with her daughter. The juvenile court found no showing of changed circumstances, referring in particular to the fact that mother's petition still listed her prison address, and denied the petition without a hearing.

On appeal, mother argues that her petition adequately showed a change of circumstance, and the juvenile court should have granted her a hearing rather than denying it ex parte. We agree that mother's purported release from prison constituted a change of circumstance because the juvenile court's original

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[1] Further statutory citations are to the Welfare and Institutions Code.

denial of reunification services was based on mother being incarcerated.

We further conclude mother's petition, liberally construed, makes a prima facie showing that granting her reunification services and liberalized visitation may promote M.S.'s best interests, and the juvenile court did not find to the contrary. This is especially true given that at the time mother filed her petition, M.S.'s longtime caregiver no longer wanted to adopt M.S. and DCFS had yet to find an alternative permanent placement. Accordingly, we reverse the juvenile court's order and direct it to hold an evidentiary hearing on mother's petition.

The parties agree that the juvenile court and respondent Los Angeles Department of Children and Family Services (DCFS) failed to investigate adequately M.S.'s possible Indian heritage, which her father claimed she had through both sides of the family, as required under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and its corresponding provisions under California law (see § 224 et seq.). We direct the juvenile court to ensure compliance with ICWA on remand.

BACKGROUND[2]

1. Detention, adjudication, and disposition

On April 3, 2017, DCFS filed a petition under section 300 seeking to detain six-year-old M.S. The petition alleged that M.S.'s father Carlos S. (father), with whom M.S. resided, abused drugs and was a registered sex offender, and that mother was

[2] We limit our summary to the information relevant to this appeal.

then incarcerated in a federal penitentiary in Florida[3] and had a criminal history that included child cruelty and drug offenses.

The detention report indicated that father and mother had extensive criminal histories and mother had prior child welfare allegations substantiated against her, including an incident in 2010 in which mother fled on foot from the scene of a motor vehicle accident, leaving infant M.S. alone in the car. Leaving M.S. in the car in 2010 apparently was the basis for the child cruelty charge in mother's criminal history. Father reported mother had had no contact with M.S. for approximately six years.

The juvenile court ordered M.S. detained and placed her with Norma O., a nonrelative extended family member.

In the jurisdiction and disposition report dated June 7, 2017, DCFS stated mother had informed a DCFS social worker by letter and e-mail that she did not wish to lose her daughter, that she had completed drug treatment, parenting classes, and other programs, and that she would like to be able to call M.S. The report stated that mother's expected release date from prison was November 24, 2018. In a last minute information also dated June 7, DCFS provided the juvenile court with mother's progress letters and certificates of completion for "Residential Drug Abuse Treatment Program, drug education, parenting education" and other programs.

In a separate last minute information filed June 7, DCFS recommended family reunification services for father, but asked that the juvenile court deny mother reunification services pursuant to section 361.5, subdivision (e)(1), a provision governing reunification services for incarcerated parents. On

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[3] We have been unable to determine from the record the offense or offenses for which mother was incarcerated in Florida.

June 29, 2017, the juvenile court sustained the allegations in the section 300 petition. On July 19, 2017, the juvenile court denied mother reunification services "pursuant to . . . section 361.5(e)." (Capitalization omitted.) The juvenile court permitted mother to have monitored phone calls with M.S. DCFS had been unable to locate father, and the juvenile court ordered DCFS to present evidence of due diligence in attempting to locate father.

On August 23, 2017, the juvenile court found that DCFS had completed due diligence and father's whereabouts were unknown. The juvenile court denied reunification services to father and set a section 366.26 hearing to select a permanent plan for M.S. A December 21, 2017 interim review report stated that caregiver Norma O. was "committed to offering [M.S.] a permanent plan of living through adoption."

2. Subsequent status review reports

A February 21, 2018 status review report stated that Norma O. was having "minor issues with [M.S.] at school and at home," specifically "an increase in lying" about homework assignments. A social worker in M.S.'s school district expressed concerns about M.S.'s telephonic contact with mother, specifically that M.S. "has been making up stories and lying more often as a result of having contact with her mother." The social worker "requested that [M.S.] have limited or no contact with mother to allow [M.S.] to focus on her school work and properly attach to [Norma O.]."

Subsequent reports indicated Norma O.'s increasing concern about M.S.'s behavior, including stealing from friends, kicking Norma O., and lying, which was making Norma O. hesitant to adopt M.S. In October 2018, Norma O. informed DCFS that she no longer wished to pursue adoption of M.S. given

M.S.'s behavior. DCFS nonetheless recommended leaving M.S. in Norma O.'s care while DCFS searched for a new permanent placement.

In an October 18, 2018 order, the juvenile court found "good cause to continue the matter for the permanent plan to be clear," and ordered DCFS to investigate another nonrelative extended family member identified by mother's counsel. The juvenile court also ordered "[m]other and minor to be referred to conjoint counseling if she does return to the Los Angeles area and can be arranged with reason."

3. Mother's section 388 petition

On November 15, 2018, mother filed a section 388 petition using a Form JV-180 "Request to Change Court Order." Mother requested that the juvenile court change its July 19, 2017 order and grant her reunification services and liberalized visits with M.S. The petition stated that mother was released from prison on November 9, 2019, and had "completed a residential drug abuse treatment program; a drug treatment series; a[ ] drug education course; a wellness course; and a communication skills course." The petition attached copies of five certificates of completion for drug and other programs, identical to certificates submitted to the juvenile court in advance of its July 19, 2017 ruling.

In explaining why changing the juvenile court's order would be better for M.S., the petition stated that "[w]hile mother was incarcerated out-of-state, mother maintained telephonic contact with minor. Further, minor has expressed interest in meeting her mother once she has been released from prison. Now that mother has been released, she is even more dedicated to her

sobriety and to being the mother she knows she can be by establishing a bond with her daughter."

The petition listed mother's address as "Incarcerated, Tallahassee, Florida."

On January 4, 2019, the juvenile court denied mother's petition without a hearing. The juvenile court checked the box on a JV-183 form order indicating that "the request does not state new evidence or a change of circumstances." The juvenile court also checked the box next to "Other," and wrote, "Address list[ed] for mother is her incarceration address." (Some capitalization omitted.)

Mother timely appealed from the denial of her petition.

4. ICWA inquiries

The section 300 petition indicated that M.S. "may have Indian ancestry." According to the detention report, father reported that M.S. "has some Native American ancestry on both sides of the family, but could not provide further information at that time." The jurisdiction and disposition report reiterated father's claim of Indian ancestry and stated that parents had provided no further information, although DCFS would "continue to obtain the information."

A 366.26 WIC report filed December 21, 2017 noted that the juvenile court "has not made a finding as to ICWA's relevance for either [p]arent." (Italics omitted.) An interim review report filed that same day, however, stated that ICWA did not apply. All subsequent filings from DCFS referring to ICWA stated or otherwise indicated that ICWA did not apply.

The juvenile court's minute orders do not mention ICWA, and there is no indication in the record that the juvenile court ruled on ICWA's applicability.

DISCUSSION

I. Mother Is Entitled To A Hearing On Her Section 388 Petition

Under section 388, subdivision (a)(1), a parent of "a dependent child of the juvenile court" may, "upon grounds of change of circumstance or new evidence," petition the juvenile court "for a hearing to change, modify, or set aside any order of court previously made." The juvenile court must hold the hearing "[i]f it appears that the best interests of the child . . . may be promoted by the proposed change of order." (*Id.*, subd. (d).)

"A petition for modification must be liberally construed in favor of its sufficiency." (California Rules of Court, rule 5.570(a).)[4] The juvenile court may deny a section 388 petition without a hearing if the petition "fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction or fails to show that the requested modification would promote the best interest of the child." (Rule 5.570(d)(1).) We review the juvenile court's decision to deny a section 388 petition without a hearing for abuse of discretion. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1158.)

A. Mother's petition states a change of circumstance

Here, mother's petition "state[d] a change of circumstance . . . that may require a change of order." (Rule 5.570(d)(1).) The juvenile court originally denied mother reunification services pursuant to section 361.5, subdivision (e),

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[4] Further rule references are to the California Rules of Court.

which governs the provision or denial of reunification services to incarcerated parents.[5] Mother's purported release from prison would render section 361.5, subdivision (e) inapplicable, removing the sole statutory basis for the juvenile court's original order denying reunification services to mother.[6]

The juvenile court noted in its order denying the section 388 petition that mother's listed address in the petition indicated that she was still incarcerated in Florida. Given, however, the petition's otherwise unequivocal statement that mother had been released on November 9, 2018, the address listing was not a basis to deny her petition without a hearing. To the extent the petition was unclear, the juvenile court could have sought clarification at the hearing on the petition or during another scheduled proceeding.

DCFS argues that mother's release from prison did not in fact constitute a change in circumstance because the juvenile court was aware that mother would be released in November 2018 at the time it denied her reunification services. We disagree. Had the juvenile court wished its order denying

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[5] Section 361.5, subdivision (e)(1) provides, "If the parent or guardian is incarcerated, . . . the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." The subdivision includes factors for the juvenile court to consider in assessing detriment and reasonable services, and a nonexclusive list of possible services. (*Ibid.*)

[6] Because the program completion certificates attached to mother's petition were identical to those submitted to the juvenile court before it denied reunification services, those certificates did not constitute "a change of circumstance or new evidence" under rule 5.570(d)(1).

reunification services to apply even after mother's release from prison, as DCFS seems to suggest, it would not have based that order expressly on a statute that applied to mother only while she was incarcerated.

DCFS cites *In re A.A.* (2012) 203 Cal.App.4th 597 (*A.A.*), which affirmed a denial of a section 388 petition following a hearing. (*A.A.*, at pp. 612–613.) In *A.A.*, the Court of Appeal stated, "Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citation.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated." (*Id.* at p. 612.) DCFS argues that the juvenile court took jurisdiction over M.S. not only because of mother's incarceration, but also her long criminal history, and "[m]other's release from custody did not ameliorate such risk."

DCFS's argument goes to the merits of mother's petition—that is, whether her release from incarceration is reason to change the juvenile court's previous dispositional order. The question before us, however, is not whether mother is entitled to a modification of the juvenile court's order, but whether she is entitled to a hearing on that issue. *A.A.*, which concerned the merits of a section 388 petition *after* the juvenile court granted a hearing, does not speak to that question.

We express no opinion as to whether the juvenile court should modify its order and grant mother reunification services or liberalized visitation. We do hold, however, that when an order denying reunification services is based expressly on a parent being incarcerated, the parent's release constitutes "a

change of circumstance . . . that *may* require a change of [that] order." (Rule 5.570(d)(1), italics added.)

DCFS points out that section 361.5, subdivision (e)(1) does not prohibit reunification services to incarcerated parents, but allows the juvenile court to deny services if they "would be detrimental to the child." To the extent DCFS is arguing the juvenile court necessarily concluded it would be detrimental to M.S. for mother to receive reunification services, the record does not support that contention.

We note that one service expressly listed under section 361.5, subdivision (e) is "[m]aintaining contact between the parent and child through collect telephone calls." (§ 361.5, subd. (e)(1)(A).) Here, the juvenile court granted mother monitored phone calls with M.S. Thus, despite its order to the contrary, the juvenile court effectively granted mother *some* reunification services under section 361.5, subdivision (e), suggesting the juvenile court did *not* find that granting such services to mother would be detrimental to M.S.

Even assuming arguendo that the juvenile court's decision to deny mother reunification services under section 361.5, subdivision (e) incorporated a finding that granting such services would be detrimental to M.S., that finding necessarily would depend at least in part on mother's being incarcerated, because that is the threshold basis for applying that statutory provision. Thus, again, mother's release constituted a change of circumstance for purposes of section 388, subdivision (a) and rule 5.570(d)(1).

B. Mother's petition made a prima facie showing that granting it may promote M.S.'s best interests

As an alternative basis to deny the petition without a hearing, DCFS argues that the petition failed to make a prima facie showing that modifying the juvenile court's dispositional order "would promote the best interest of the child." (Rule 5.570(d)(1).) The juvenile court did not deny the petition on that basis, leaving that box unchecked on its form order. Nor had there been any previous finding that granting mother reunification services or allowing greater contact between mother and M.S. would not promote M.S.'s best interests. Indeed, after Norma O. decided not to proceed with adopting M.S., the juvenile court referred mother and M.S. to conjoint counseling if mother returned to Los Angeles.[7] We cannot affirm the juvenile court's ex parte denial based on a finding it never made.

Given the mandate that "[a] petition for modification must be liberally construed in favor of its sufficiency" (rule 5.570(a)), we also conclude that mother's petition made an adequate prima facie showing that granting it "may" promote M.S.'s best interests. (See § 388, subd. (d).) The petition stated that mother was "even more dedicated to her sobriety and to being the mother she knows she can be," which, liberally construed, indicates

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[7] We recognize that the referee who denied mother's section 388 petition was not the same adjudicator who earlier referred mother and M.S. to conjoint counseling. Regardless, neither adjudicator made a finding on the record that it would not promote M.S.'s best interests to grant mother reunification services or allow greater contact between mother and M.S.

mother's interest in retaining custody of and parental rights over M.S. Given that M.S.'s caregiver had decided not to adopt her and, as far as the record indicates, DCFS had yet to find an alternative permanent placement, attempting to reunite M.S. with her natural mother may promote M.S.'s best interests.

DCFS criticizes mother's petition for lacking specificity as to her plans for remaining sober or returning to Los Angeles. We are unaware of any requirement that a section 388 petition contain extensive detail in order to obtain a hearing on the petition. (See rule 5.570(a)(7) [requiring "[a] *concise* statement of any change of circumstance or new evidence that requires changing the order," italics added].) We think it specific enough that mother claimed to be out of prison, dedicated to her sobriety, and willing to care for her daughter, all of which, liberally construed, could promote M.S.'s best interests.

To be clear, we in no way intend to limit the juvenile court's authority to decide, following a hearing on mother's petition, whether granting the petition may promote M.S.'s best interests (see rule 5.570(e)(1)), a question on which we express no opinion. We merely hold that mother's petition, liberally construed, makes an adequate prima facie showing entitling her to a hearing.

We recognize that rule 5.570(f) provides an additional choice that falls between denying a section 388 petition ex parte or ordering a full evidentiary hearing on the petition; the juvenile court may also "order a hearing for the parties to argue whether an evidentiary hearing on the petition should be granted or denied." (Rule 5.570(f)(2).) Neither party contends the juvenile court should hold a rule 5.570(f)(2) hearing; mother seeks a full evidentiary hearing and DCFS argues for ex parte denial. A rule 5.570(f)(2) hearing also would serve no purpose

given our conclusion that mother's petition made a prima facie showing of both a change of circumstance and possible promotion of M.S.'s best interests. Thus, the proper course is for the juvenile court to hold a full evidentiary hearing on mother's petition.

II. On Remand, The Juvenile Court Must Ensure Compliance With ICWA

ICWA requires that notice be provided "to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' " (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8, quoting 25 U.S.C. § 1912(a).)[8] The juvenile court and DCFS have "reason to know a child involved in a proceeding is an Indian child" if, among other things, "a member of the child's extended family informs the court that the child is an Indian child." (§ 224.2, subd. (d)(1).) In that event, the juvenile court or social worker "shall make further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable." (*Id.*, subd. (e).) "[T]he burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family.

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[8] If the juvenile court "has reason to know an Indian child may be involved in the pending dependency proceeding but the identity of the child's tribe cannot be determined, ICWA requires notice be given to the federal Bureau of Indian Affairs." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 232 (*Michael V.*), citing 25 U.S.C. §§ 1903(11), 1912(a).)

Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child." (*Michael V.*, *supra*, 3 Cal.App.5th at p. 233; see § 224.2, subd. (a).)

The parties agree that, despite father stating that M.S. had Indian ancestry, neither DCFS nor the juvenile court conducted the inquiry required by ICWA and that remand for compliance is the appropriate remedy. The record supports the parties' contention. We therefore direct the juvenile court to conduct the inquiry required by ICWA.[9]

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[9] We are aware that a district court in Texas concluded ICWA was unconstitutional for many reasons, including that it violates equal protection and improperly requires state agencies to apply federal standards to state claims. (*Brackeen v. Zinke* (N.D. Tex. 2018) 338 F.Supp.3d 514, 536, 541.) The parties do not raise any issue with respect to the constitutionality of ICWA, and we are not bound by the lower federal court's holding.

DISPOSITION

The order denying mother's section 388 petition is reversed. The juvenile court shall enter a new order setting an evidentiary hearing on that petition.

The juvenile court shall also direct DCFS to conduct an inquiry of M.S.'s possible Indian ancestry and, if appropriate, to provide proper notice to any relevant tribes and any other parties as required by law, and to submit those notices and any responses thereto to the juvenile court. The juvenile court thereafter shall make findings concerning the adequacy of DCFS's compliance with ICWA's inquiry and notice requirements and the applicability of ICWA to this case. If the juvenile court concludes that M.S. is an Indian child, it shall conduct further proceedings in accordance with ICWA and related California law.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.